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CHARLES ELMORE CROPLEY
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No. 49

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1930

BAIN PEANUT COMPANY OF TEXAS, ET AL.,
Appellants

vs.

DAVE PINSON AND C. B. GUYGER,
Appellees

APPEAL FROM THE COURT OF CIVIL APPEALS FOR THE ELEVENTH SUPREME JUDICIAL DISTRICT OF TEXAS

APPELLANTS' PETITION FOR REHEARING

B. L. AGERTON,
Counsel for Appellants.

BRYAN, STONE, WADE & AGERTON,
and
B. G. MANSELL,
Of Counsel.

AMERICAN BRIEF CO., 838 MONROE ST., FORT WORTH

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BAIN PEANUT COMPANY OF TEXAS, ET AL.,
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APPELLANTS' PETITION FOR REHEARING

To The Honorable Supreme Court of the United States:

On January 29, 1931, the Supreme Court of Texas entered an explanatory order which fully sustains appellants' position with reference to the jurisdiction of this Court, insofar, at least, as such jurisdiction may be affected by the subject matter of appellees' motion to dismiss. We include that order and the motion upon which it was entered as an appendix hereto. A certified copy of those documents has been filed with the Clerk. In the case of *Whitney vs. California*, 274 U. S.

357, 71 L. Ed. 1095, this Court considered such an order under conditions practically identical with the situation now before the Court and thereupon reinstated a writ of error previously dismissed. Appellants respectfully and earnestly pray the Court to consider that order and motion as a part of this Petition for Rehearing.

* * * * * *

The order of dismissal entered January 19, 1931, reads:

> "The appeal herein is dismissed for want of a properly presented federal question. John vs. Paullin, 231 U. S. 583, 585; Central Union Telephone Co. vs. Edwardsville, 269 U. S. 190, 195; Beaty vs. Richardson, 276 U. S. 599."

Examination of each of those authorities and of the prior reports of the decisions of the several state courts discloses that those courts in each instance found and declared either an actual want of jurisdiction arising from a clearly stated violation of some essential procedure, or else refused to review the Federal question raised in the lower courts because of some definitely indicated failure to observe the proper procedure to that end.

Thus in *John vs. Paullin,* 106 Pac. 838, the Oklahoma Supreme Court dismissed a writ of error to the trial court for want of juricdiction, because it found that plaintiffs in error had failed to bring before the Court within the statutory time certain indispensible parties. In *City of Edwardsville vs. Central Union Telephone*

Co., 141 N. E. 206, the Illinois Supreme Court held that an appellant had waived his Federal question by failing to appeal directly to that Court, instead of appealing first to a district court of appeals, under a statute requiring appeals involving the constitutionality of a statute to run directly to the Supreme Court, the penalty for violation of the statute being a waiver of such constitutional question. And the Georgia Supreme Court in *Beaty vs. Richardson*, 138 S. E. 54, held that an appellant there waived the right to have it review a Federal question raised below by his failure to cite authorities supporting his contention or to brief the question in the Supreme Court. Here there is no express finding by the Supreme Court of Texas that it did not have jurisdiction and no intimation that its refusal to pass on the Federal question resulted from any failure by appellants properly to present that question. Such conclusion rests upon inference alone arising out of the apparent ambiguity of the judgment of that Court which dismissed Bain Peanut Company of Texas' application for writ of error "for want of jurisdiction." The explanatory order shown in the appendix hereto clears away that ambiguity in favor of appellants' contention with respect thereto and favorably to the jurisdiction of this Court.

Appellees advance but one argument against jurisdiction, viz: That the judgment of the Supreme Court of Texas dismissing "for want of jurisdiction" Bain Peanut Company of Texas' application for writ of error spoke a want of actual jurisdiction, from which they conclude that said application did not suspend the fi-

nality of the judgment of affirmance by the Court of Civil Appeals, dated July 12, 1929; and, in consequence, this appeal allowed January 23, 1930, more than ninety days after the date of that judgment, comes here too late. The Court has suggested no other ground for dismissing this appeal, nor can any other inference be drawn from the authorities cited in the order of dismissal. Those authorities simply illustrate the familiar principle that this Court will not entertain jurisdiction to review a state court judgment until the complaining party shall have exhausted the remedies provided by his local procedure in seeking a review by the state court of last resort.

If by any possibility appellants misapprehend the meaning of this Court's order of dismissal, and said order literally reflects the basis of the Court's decision, appellants most respectfully submit that the Court is in error in concluding that the Federal question was not properly presented. This Court has repeatedly indicated that it is not particularly concerned with either the form or time in which a Federal question is presented to a state court whose judgment is brought here for review; the essential considerations here being (a) that the Federal question was raised in and determined by the state court, and (b) that the record discloses those facts. This was illustrated in the case of *Sullivan vs. State of Texas,* 207 U. S. 416, 52 L. Ed. 274, in which the Federal question was first raised on motion for rehearing in the Court of Civil Appeals of this State. But since it was acted on by that Court, this Court held that it had been presented in a timely manner. At page 9 of the Record

is an assignment of error filed in the trial court, which is clearly sufficient to raise the Federal question. That assignment of error was a part of the Record in the Court of Civil Appeals, because it comes here under the certificate of the Clerk of that Court. That assignment indicates that the Federal question here presented was urged as the sole ground of error in the action of the trial court in overruling Bain Peanut Company of Texas' general demurrer to plaintiffs' controverting affidavit; and that the asserted right of Bain Peanut Company of Texas to have the case transferred to Tarrant County was denied solely because of the statute in question, the constitutionality of which, under the equal protection clause of the 14th Amendment to the Federal Constitution, was there clearly challenged. At pages 9-11 of the Record is a certified question submitted by the Court of Civil Appeals to the Supreme Court while the case was there pending, in which it was clearly stated by the Court that a correct disposition of the appeal required it to determine whether the trial court had erred in overruling the aforesaid demurrer to appellees' controverting plea. It further unequivocally stated (R. 10) that a correct answer to that question depended upon whether or not the statute in question violated the equal protection clause of the 14th Amendment to the Federal Constitution, saying that said statute had been held unconstitutional on that very ground by the Court of Civil Appeals for the Third District in the then recent cases of *Dublin M. & E. Co. vs. Cornelius*, 5 S. W. (2d) 1027, and *Houston Light & Power Co.* 5 S. W. (2d) 1030. The certificate concludes:

> "Is that provision of Subdivision 23, Art. 1995, R. S., 1925, reading as follows: "Suits against a private corporation, association or joint stock company may be brought in any county in which the cause of action, or a part thereof, arose,' repugnant to the 14th Amendment to the Constitution of the United States?"

The certificate was withdrawn by the Court of Civil Appeals on the express ground that the Supreme Court has "upheld the constitutionality of the statute involved in the case of *Grayburg Oil Co vs. N. P. Powell*, 15 S. W. (2d) 542." The Court of Civil Appeals (R. 13) overruled the Bain Peanut Company of Texas' contention that its plea of privilege to be sued in Tarrant County should have been sustained, stating that the question "arises from the overruling of defendants' demurrer to plaintiffs' controverting affidavit," and that plaintiffs rested their right to maintain venue in Comanche County under the statute solely on the ground that Bain Peanut Company of Texas was a private corporation and that the cause of action arose in that county. It further said, referring to the two Court of Civil Appeals cases cited by the Court in its certificate to the Supreme Court (R. 10) that the statute now before the Court had in those cases been held unconstitutional, but had been subsequently overruled in the case of Grayburg Oil Co. vs. Powell by the Commission of Appeals, with the approval of the Supreme Court. Thus, although the Court of Civil Appeals did not in express terms mention the Federal Constitution, no other possible inference can be drawn from the portion of the Court's opinion which disposed of said question, when read in connection with

the corresponding portion of the Court's certificate to the Supreme Court at page 10 of the Record. The Record does not disclose that any State Constitutional question was raised but it is clearly shown that the statute in question was challenged because of its asserted violation of the equal protection clause of the 14th Amendment to the Federal Constitution. Necessarily, therefore, the Court of Civil Appeals, according to its own language at page 10 of the Record, passed upon and determined the Federal question adversely to the rights of Bain Peanut Company of Texas asserted thereunder. Bain Peanut Company of Texas' Third Assignment of Error in its motion for rehearing, R. 22, challenges the aforesaid conclusion of the Court of Civil Appeals as erroneous, referring specifically to the second and third propositions in its brief before that Court. The proposition at page 24 of the Record is the *second* proposition so referred to, brought forward as a proposition in Bain Peanut Company of Texas' petition for writ of error to the Supreme Court; and that fact appears from the Record at page 25, and the proposition is followed by citation of authorities relied on below and here. Thus appellants presented the Federal question in the trial court and in the Court of Civil Appeals. The Court of Civil Appeals in its own language, in sustaining the action of the trial court, which overruled Bain Peanut Company of Texas' general demurrer to appellees' controverting affidavit, necessarily determined that question against Bain Peanut Company of Texas, R. 10. The question was again presented to the Court of Civil Appeals on rehearing (R. 22); to the

Supreme Court in petition for writ of error by statement, assignment of error, proposition and citation of authorities (R. 23-25); and on rehearing in the Supreme Court (R. 27); by assignment of error in petition for allowance of this appeal (R. 31); and by designation of point here to be relied on (R. 33).

For the reasons mentioned and (a) because the Court of Civil Appeals did consider and rule on the Federal question here presented adversely to appellants' claim, and (b) because the Supreme Court of Texas has said that its refusal to review the case resulted solely from its view that the lower Court had properly disposed of it, any possible doubt as to proper presentation of the Federal question should be dispelled.

Unquestionably under the rule laid down by this Court in *Railway Co. vs. Mihas*, 280 U. S. 102, 74 L. Ed. 207, and *Railway Co. vs. Rock*, 279 U. S. 410, 73 L. Ed. 766, appellants exhausted their remedies in seeking review by and relief from the Supreme Court of Texas by petitioning that Court for a writ of error to the Court of Civil Appeals and moving it for rehearing after the application had been refused. That motion for rehearing was overruled January 22, 1930, R. 28. Hence, for the purpose of this appeal, the judgment of the Court of Civil Appeals became final on that date.

We cannot escape the conclusion that the Court, resolving against its jurisdiction, a doubt arising from the unfortunate ambiguity of the Texas Supreme Court order, in effect sustained appellees' motion and so dismissed the case. Nor can we doubt that the Court is

unwilling to determine an appellant's rights upon such purely technical considerations, without passing on the merits of the case, when, on rehearing, jurisdiction is clearly shown.

When appellees filed their motion here to dismiss, appellants asked the Supreme Court of Texas for some clarifying order such as we now present to dispel any uncertainty regarding the jurisdiction of this Court raised by that motion. The members of the Court fully concurred in appellants' view that its judgment of dismissal "for want of jurisdiction" indicated merely a refusal to review the case, not any actual want of jurisdiction, and that the form of that order was controlled by Art. 1728, R. C. S. Upon considerations then regarded by the members of that Court as justifying a refusal of our request, they did refuse it. However, when it appeared that the ambiguity of their said order probably resulted in a failure of appellants to secure a review of the case on the merits here, they very graciously made the clarifying order herewith submitted.

Public interest of more than usual importance attaches to the case. The statute here questioned affects in a very vital way substantial rights of many litigants almost every day. Attorneys and clients subject to the statute are uncertain as to their rights. Although our Supreme Court has sustained the statute against the very constitutional objection here urged, some of our courts of civil appeals have accepted that decision reluctantly. The Third or San Antonio Court of Civil Appeals in *Central Union Life Insurance Co. vs. Pesek*, 22 S. W. (2d) 1090, went so far as to write an opinion

—unanswerable in our opinion—against the constitutionality of said statute after the Supreme Court had sustained it. We believe this Court's jurisdiction is now clear. The question is fully and fairly raised. An early decision by this Court of last resort is needed to clarify the situation; and it will not be settled until this Court has finally spoken. It will be here again for decision soon unless now decided, and we most respectfully and earnestly ask the Court now to take jurisdiction and finally to decide the case on its merits.

Respectfully submitted,

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Counsel for Appellants.

CERTIFICATE

We, the undersigned, counsel for appellants in the above entitled and numbered cause, hereby each certify that the foregoing Petition for Rehearing is presented in good faith and not for delay.

WITNESS OUR HANDS at Fort Worth, Texas, this ..... day of ..... 1931.

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Counsel for Appellants.

APPENDIX

Mo. No. 9436

BAIN PEANUT COMPANY OF TEXAS
Plaintiff in Error

vs.

PINSON AND GUYGER
Defendants in Error

Plaintiff in Error has filed a motion for an order nunc pro tunc correcting the order heretofore entered by this Court dismissing its application for a writ of error.

It is true, as contended by plaintiff in error, that its failure to file an application for writ of error within thirty days from July 12, 1929, on which date the Court of Civil Appeals vacated its initial judgment and entered a more onerous judgment against plaintiff in error, was not regarded as defeating the jurisdiction of the Supreme Court to revise by writ of error such more onerous judgment. In our opinion, the Court of Civil Appeals clearly acted within the scope of its lawful authority on July 12, 1929, when, on motion seasonably filed, it vacated its initial judgment. There then remained subject to review or enforcement only the judgment of July 12, 1929. Whatever errors were to be corrected were those arising from that judgment on the rehearing in the Court of Civil Appeals. The rule is

established in Texas that a party's petition for writ of error to the Supreme Court must be filed within thirty days from the date on which his motion for rehearing was overruled in the Court of Civil Appeals. *Schleicher* v. *Runge*, 90 Tex. 456; *Vinson* v. *Carter & Brother*, 106 Tex. 274; *Henningsmeyer* v. *Bank*, 109 Tex. 117. Nevertheless, each time the Court of Civil Appeals, on motion or motions duly filed, validly vacates its previous judgment or judgments and substitutes therefor a different valid judgment against a party, he is thereby entitled to seek correction, through rehearing, of such different judgment, and it is not compulsory that he invoke the jurisdiction of the Supreme Court earlier than within thirty days from the overruling of his last motion for rehearing. Our statutes contemplate that a case should be reviewed by the Supreme Court at the instance of one party not piecemeal but as an entirety. Hence, it is only when the jurisdiction of the Court of Civil Appeals has terminated by overruling a party's permissible motion or motions for rehearing and thus leaving its judgment in the form it directs that it be finally enforced against him, that the period of thirty days for him to invoke the jurisdiction of the Supreme Court under writ of error begins finally to run.

In the above cited case of Henningsmeyer v. Bank, the Court called attention to the fact that it did not question the authority of the Court of Civil Appeals to set aside a former order and enter an entirely different order, but the ruling was that no effect would be given to such action when taken for no other purposes than

to permit an application for writ of error to be filed after lapse of the statutory time.

Regarding the last judgment as that complained of, since the first was already vacated, the Court considered plaintiff in error's application as presented in due time under its practice stated in 3 *Texas Jurisprudence*, section 175, as follows:

> "When the order complained of is not made until the rehearing in the Court of Civil Appeals it is necessary for the complaining party to make a further motion for rehearing if he would in the Supreme Court urge as erroneous the order complained of; for, in the light of the rules of the Supreme Court, the motion for rehearing, to form the basis for a consideration in the Supreme Court, must be predicated upon the judgment or order of the Court of Civil Appeals actually deciding the matters complained of."

While regarding the application for writ of error as filed within the proper and statutory time, we intended and did dismiss the application for want of jurisdiction under Article 1728 as amended by Acts 1927, 40th Legislature, page 214; Article 1728, Complete Texas Statutes of 1928, having concluded that while the case otherwise came within the potential jurisdiction of the Supreme Court, it was a case where the judgment of the Court of Civil Appeals was a correct one, but we were not satisfied that the opinion of the Court of Civil Appeals had in all respects correctly declared the law. For that reason, it was the Court's duty, under the statute, to refuse to take jurisdiction and to dismiss the case for want of jurisdiction.

Because the order entered on the minutes correctly reflects the action of the Court, the motion of plaintiff in error is overruled.

THOMAS B. GREENWOOD,
Associate Justice.

Opinion delivered January 29, 1931.

I, F. T. Connerly, Clerk of the Supreme Court of the State of Texas, do hereby certify that the above and foregoing two pages contain a true and correct copy of the original opinion of the Supreme Court of Texas on Motion to Correct Judgment Entry in the case of Bain Peanut Company of Texas, Plaintiff in Error vs. Pinson & Guyger, Defendant in Error, Mo. No. 9436, (App. No. 17123), from Comanche County, Eleventh District, said original opinion having been delivered by the Supreme Court of Texas on January 29th, 1931, and now being on file in this office.

IN TESTIMONY WHEREOF, Witness my hand and the seal of the Supreme Court of the State of Texas, at the City of Austin, this the 29th day of January, A. D. 1931.

(SEAL) F. T. CONNERLY,

Clerk of the Supreme Court of Texas.

No. 9436

IN THE
SUPREME COURT OF THE STATE OF TEXAS

BAIN PEANUT COMPANY OF TEXAS

vs.

PINSON AND GUYGER

To the Honorable Supreme Court of Texas:

Petitioner, Bain Peanut Company of Texas, represents that on May 3, 1929, the Court of Civil Appeals for the Eleventh Supreme Judicial District of Texas entered an order, on appeal of said case from the District Court of Comanche County, Texas, reforming the judgment of said District Court against it, and affirming the judgment as reformed. The result of such reformation was to reduce the money judgment rendered by the District Court against Bain Peanut Company of Texas by more than $1,000 and to adjudge the costs, both of the trial court and of the Court of Civil Appeals, against appellees. Both appellant below and appellees filed motion for rehearing in due time, appellant asking that the case be either reversed and rendered or reversed and remanded and appellees asking that the order of reformation be set aside and that the case be affirmed in its entirety. On July 12, 1929, the motion

of appellant below was overruled and that of appellees granted. The order of reformation and affirmance theretofore entered, the judgment rendered thereon and the opinion of the court filed in connection therewith were all expressly vacated and withdrawn and a new judgment, one of affirmance, entered as of that date and a new opinion as of that date was rendered by the court. Thereupon, in accordance with the rules of this court prescribed in the case of *Knox vs. McElroy*, 103 Texas 357, and *Roth vs. Murray*, 105 Texas 6, appellant below presented another motion for rehearing addressed to the judgment and opinion of July 12, 1929, being the only judgment and opinion of the Court of Civil Appeals then or at any time thereafter in existence. On October 18, 1929, said motion, designated for convenience as a second motion, but in fact and in law under the decisions referred to an original motion for rehearing, was overruled by the Honorable Court of Civil Appeals. A petition for writ of error was presented to this Court in due time, conforming in all respects to the practice prevailing in this Court; and on December 11, 1929, this Court entered an order upon said petition in form dismissing same as for want of jurisdiction; and motion for rehearing thereon was overruled January 21, 1930.

Petition for the allowance of an appeal was presented to and granted by the Chief Justice of the Court of Appeals at Eastland, Texas, and Bain Peanut Company of Texas thereafter perfected its appeal to and lodged the record in the Supreme Court of the United States. Appellees below, being also appellees in the United States

Supreme Court, there filed a motion to dismiss the appeal which has been sustained by the Supreme Court of the United States by order entered January 19, 1931. That motion related to an alleged failure of Bain Peanut Company of Texas to petition this Honorable Court for writ of error within the time prescribed by the Statutes of the State of Texas and the rules of this Court. The sole ground for said motion is that Bain Peanut Company's petition for writ of error should have been presented to this Court within thirty days after July 12, 1929, when its first motion for rehearing was overruled, instead of filing a motion addressed to the judgment and opinion of affirmance rendered by the Court of Civil Appeals on July 12, 1929, and awaiting an order overruling same. It is argued from the aforementioned circumstances that the order of dismissal of Bain Peanut Company's petition for writ of error indicated the judgment of this Court was that said petitioner had not sought relief before this Court in a timely manner and that this Court was therefore in fact without juricdiction; while it is Bain Peanut Company's view that the aforesaid order of this Court evidenced nothing but a refusal of this Court to exercise its discretion to refuse to review the judgment of the court below, and that the judgment and order of dismissal should be referred to and is controlled by Section 2, Article 1728, Revised Civil Statutes, 1925, as amended by Chapter 44, Acts of the Fortieth Legislature in 1927.

The form of the order of this Court, while made in obedience to said statute, and conforming to the language thereof, is ambiguous when read in the ordinary

meaning of the language there used. That ambiguity has resulted in the Supreme Court of the United States being misled as to the true character and significance of the aforesaid order and dismissal, that court obviously regarding that the order of dismissal was intended by this Court to declare an actual want of jurisdiction, and such conclusion, in the state of the record before it, was fatal to the jurisdiction of that court.

In the circumstances Bain Peanut Company of Texas says that by reason of an ambiguity in an order of this Court, made in obedience to a legislative mandate, prescribing the form of such order, it has suffered great injury in that such form of order has misled the United States Supreme Court, and has resulted in an order of that court dismissing its appeal and thereby denying it a hearing on the merits of that appeal. Its rights in that appeal, asserted under the Constitution of the United States and of which the United States Supreme Court is the final judge, have been therefore denied, not upon consideration of the merits but upon procedural considerations and a judgment of this Court which did not in unambiguous language speak its true character and significance.

While petitioner is aware that this court no longer has jurisdiction of the case, it does submit that the Court has at all times, and regardless of the pendency of the case on appeal in the United States Supreme Court, jurisdiction over its records and the right to so amend or correct them as to make them speak the truth, and a brief in support of this contention is herewith submitted.

It is imperative, unless petitioner's rights are to be finally determined on a technical matter of procedure rather than on the merits of the case, that the order heretofore entered be amended or modified or that the Court make some declaration clarifying and officially declaring the true character and significance of such order so that the same may be brought to the attention of the United States Supreme Court in its true light, character and legal significance in connection with Bain Peanut Company's petition for rehearing before that Court. That petition for rehearing must be filed within 25 days after January 19, 1931.

WHEREFORE, petitioner respectfully prays that this Honorable Court do now forthwith enter an order nunc pro tunc declaring and defining the actual character and legal significance of the order heretofore entered by this Court on December 11, 1929, wherein Bain Peanut Company's petition for writ of error was dismissed for want of jurisdiction, so that the records of this Court with respect to the matter shall speak the truth in unambiguous language.

Respectfully submitted this 23rd day of January, A. D. 1931.

W. A. KEELING,

BRYAN, STONE, WADE & AGERTON,
BY B. G. MANSELL,
Attorneys for Petitioner.

(ENDORSED) Mo. No. 9436. App. No. 17123. BAIN PEANUT COMPANY OF TEXAS VS. PINSON AND GUYGER. MOTION TO CORRECT JUDGMENT ENTRY. Filed in Supreme Court Jany. 23, 1931. F. T. Connerly, Clk., By H. L. Clamp, Depty. OVERRULED Jany. 29, 1931.

I, F. T. Connerly, Clerk of the Supreme Court of the State of Texas, do hereby certify that the foregoing 4 pages contain a true and correct copy of the original Motion to Correct Judgment Entry, together with all endorsements thereon, in the case of Bain Peanut Company of Texas, Plaintiff in Error, vs. Pinson & Guyger, Defendants in Error, Motion No. 9436, from Comanche County, Eleventh District, said original motion now being on file in this office.

IN TESTIMONY WHEREOF, Witness my hand and the seal of the Supreme Court of the State of Texas, at the City of Austin, this the 29th day of January, A. D. 1931.

(SEAL) (Signed) F. T. CONNERLY,
Clerk of the Supreme Court of Texas.